

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A.
DREW EDMONDSON, in his capacity as
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA AND
OKLAHOMA SECRETARY OF THE
ENVIRONMENT C. MILES TOLBERT,
in his capacity as the TRUSTEE FOR
THE NATURAL RESOURCES FOR
THE STATE OF OKLAHOMA,**

Plaintiff,

v.

Case No. 05-CV-00329 GKF-SAJ

**TYSON FOODS, INC., TYSON
POULTRY, INC., TYSON CHICKEN,
INC., COBB-VANTRESS, INC., CAL-
MAINE FOODS, INC., CAL-MAINE
FARMS, INC., CARGILL, INC.,
CARGILL TURKEY PRODUCTION,
LLC, GEORGE'S, INC., GEORGE'S
FARMS, INC., PETERSON FARMS,
INC., SIMMONS FOODS, INC., and
WILLOW BROOK FOODS, INC.,**

Defendants.

**AL SAUNDERS' MOTION TO QUASH SUBPOENA
AND BRIEF IN SUPPORT**

Comes now non-party Al Saunders ("Saunders") by and through his attorneys, Hall Estill, Hardwick, Gable, Golden & Nelson, P.C., Michael Graves, and Ken Williams and respectfully submits this Motion to Quash, or alternatively, Motion to Schedule Testimony regarding the subpoena delivered to Hall Estill on September 10, 2009, and requiring Saunders' testimony at the trial scheduled to begin on September 24, 2009¹, because said Subpoena: (i) is unduly

¹ When counsel for the Plaintiff contacted Mr. Saunders' counsel to see if he would accept the subpoena on Mr. Saunders' behalf, he informed said counsel that the trial would begin on September 24, 2009.

burdensome and calls for the an unacceptable risk to Saunders' livelihood, and (ii) requires Saunders to violate his contractual and statutory duties. Accordingly, the Subpoena should be quashed.

INTRODUCTION

On September 10, 2009, Plaintiff, State of Oklahoma served its Subpoena on Saunders seeking to compel his testimony regarding his poultry growing operation. (See Subpoena, attached hereto as *Exhibit "A"*.) The trial of this action is scheduled to begin on September 24, 2009. Since issuing the Subpoena, Plaintiff has stated that it does not anticipate calling any poultry grower to testify before mid-October 2009. However, due to the unique circumstances of Saunders' poultry growing operation, any requirement to testify prior to November 6, 2009 would be unduly burdensome. Saunders objects to this Subpoena, and requests that the Subpoena be quashed, or in the alternative, modified so that Saunders is excused from testifying in this case prior to November 6, 2009.

ARGUMENT AND AUTHORITIES

I. Applicable Rules of Civil Procedure

Rule 45(c)(3)(A) governs motions to quash subpoenas and provides that "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it ... (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv). The Subpoena in the present action was issued to compel trial testimony, and courts have promulgated few opinions regarding challenges to such subpoenas.

II. Applicable State Law

Saunders' business involves accepting newly hatched fowl and caring for them until they are ready to be returned to the poultry company. This arrangement is governed by the contract between Saunders and the poultry company as well as the law of bailment, in general, and

bailment of live animals, in particular. 15 Okla. Stat. §§ 454, 466. Under these statutes, Saunders is obligated to use at least ordinary care to provide suitable food and shelter for the bailed animals. *Id.* Therefore, the standard of ordinary care for these animals is defined by the requirements to provide sustenance and shelter suitable for the birds and in accordance with Saunders' contract with the poultry company.

III. This Subpoena Is Unduly Burdensome Because It Requires Violation of State Law and Poses an Unduly Burdensome Business Risk

On September 14, 2009, Saunders accepted his regular placement of newly hatched fowl. Plaintiff's request for the testimony of Al Saunders requires that he be present at the courthouse during a time while he has birds growing in his poultry houses. Leaving the poultry houses to attend trial is inconsistent with Saunders' duty of care as a bailee for live animals. *Id.*; See also, *Chambers v. Morgan*, 671 P.2d 89, 91 (Okla. Civ. App. 1983). By accepting and growing these birds, Saunders acts as a bailee for living animals and must conform his conduct to satisfy the governing statute. 15 Okla. Stat. § 454. To satisfy this standard requires constant vigilance and the presence of an individual who can make the necessary adjustments or repairs to the animals' food and shelter. (See Affidavit of Al Saunders, *Exhibit "B"* attached hereto.) It would be a violation of state law for a poultry grower to neglect these duties and violate this standard of care. Attending a trial would keep Saunders away from the poultry house for at least several hours each day his presence was required. Saunders would then be unable to fulfill his contractual and statutory duties. Therefore, the subpoena is unduly burdensome and should be quashed.

The poultry houses where the birds reside are designed with the needs and fragility of developing birds in mind. The houses use computers to control the poultry barn environment and food delivery, and these computers require near constant monitoring. This monitoring is

necessary to allow for rapid repairs or environmental condition corrections in case of equipment failure. Were Saunders to be away from the houses for more than 2 to 3 hours while the birds are very young, there is a danger that the entire flock could be lost.² This risk increases as the birds grow, and, after the birds are 4 weeks old, Saunders must be able to reach the poultry barn within fifteen minutes to handle any problems in the bird houses. At this stage, if the alarms on the house's environmental control system were to sound and Saunders could not reach the poultry barns in time to make the necessary corrections, the entire flock *would* be lost. Because the houses are only able to handle about 5 flocks a year, the loss of a flock would represent the loss of about 20% of Saunders' yearly income. Moreover, the loss of a flock would place Saunders at risk of losing his poultry growing contract. Further, the poultry growing operation is such that Saunders can only operate it profitably as a one-man undertaking. Saunders has no one else with knowledge of the equipment to look after the birds in his absence. (See Exhibit "B.")

Taken together, these facts demonstrate that being away from his chicken houses for an extended period of time while the houses contain a flock of chickens poses an unacceptable risk and an undue burden on Saunders. The risk of loss of the flock and the subsequent risk of loss of his livelihood is much more than that encountered by most people who are called to testify. Accordingly, the subpoena should be quashed.

IV. Judicial Precedent Does Not Bar Saunders' Request to Quash Plaintiff's Subpoena

The standard to quash a subpoena to testify is high. In *Fisher v. Ford Motor Company*, 178 F.R.D. 195 (N.D. Ohio 1998), the Court refused to quash subpoenas served on treating physicians to testify at depositions regarding their factual treatment decisions. The physicians argued that they should not be required to testify for only the standard witness fee because they

² Mr. Saunders' poultry houses are approximately an hour and thirty minutes driving time from the courthouse. Accordingly, it would be a physical impossibility for Mr. Saunders to be able to testify within this narrow window of availability.

would be losing income during that time. In spite of these income losses, the Court held that, “The law nonetheless imposes an obligation on all witnesses to provide their testimony. No exceptions are made for hardship, inconvenience, unfairness, or professional status.” *Id.* at 199; See also *Mangla v. University of Rochester*, 168 F.R.D. 137 (W.D.N.Y. 1996).

The Court made clear that the doctors could not refuse to testify due to their loss of income. However, the argument presented by the doctors in *Fisher* is not the same as that presented here by Saunders. First, Saunders has not refused to testify and only seeks to have the burdensome requirements of the Subpoena lifted. Second, unlike the doctors who would lose the income generated over a day or two, Saunders runs an unacceptably high risk of losing a flock which would be the equivalent loss of 2½ months of income. Moreover, the risk of losing the contracts sustaining his poultry growing operations is an even greater risk than that borne by others merely for testifying at trial. Under these circumstances, Saunders could “suffer [far] more inconvenience than many other citizens called forward to be deposed or testify as a trial witness in a matter in which they have first hand factual knowledge.” *Mangla*, 168 F.R.D. at 140.

As a non-party to this action, Saunders should be granted particular protection from undue burden. Requiring Saunders to testify at trial while he has a flock of birds in his care poses an unacceptable risk to Saunders’ entire livelihood. Accordingly, the subpoena places an undue burden on Saunders and should be quashed.³

V. The Subpoena Could be Modified to Reasonably Ensure that Saunders Has No Birds On Site When Called to Testify

As stated above, Saunders has not refused to testify and only seeks to have the undue burden of the Plaintiff’s subpoena relieved. This relief could also be accomplished, in the

³ In addition, the Plaintiff took Mr. Saunders deposition in October 2006. Accordingly, there is no pressing need for Mr. Saunders’ in-court testimony.

alternative, by modifying the subpoena. Once the flock presently on site is sufficiently grown and out of the house, Saunders would be free to testify until another flock arrives. This typically allows a window of 2 to 3 weeks between resident flocks. (See *Exhibit "B."*).

It is axiomatic that court proceedings, depositions, and hearings are often scheduled for the convenience of the Court and the participants. This matter is no different. As shown above, it is far more than "inconvenient" for Saunders to testify while he has a flock in his bird houses. Further, the anticipated length of the trial in this matter will allow for great flexibility as to when witnesses can testify. Saunders anticipates that the flock currently residing in his bird houses will be shipped out no later than November 5, 2009. Accordingly, as an alternative to quashing the subpoena, Saunders requests that the subpoena be modified to require his testimony no earlier than November 6, 2009 and no later than November 20, 2009.

CONCLUSION

For the reasons stated above, Saunders requests that the Court quash the Subpoena dated September 9, 2009 or, alternatively, modify the subpoena so that Saunders' testimony may not be compelled until November 6, 2009 but before November 20, 2009.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,
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CERTIFICATE OF SERVICE

I certify that on the 23rd day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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